Nos. 07-984 and 07-990

In The Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE HONORABLE G. TRACY MEHAN, III, FORMER ASSISTANT ADMINISTRATOR FOR WATER AT THE U.S. ENVIRONMENTAL PROTECTION AGENCY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTRODUCTION AND INTEREST OF THE AMICUS CURIAE

The parties' consent to the filing of this brief was filed with the Clerk of this Court in accordance with Supreme Court Rule 37.[1]

Amicus Curiae G. Tracy Mehan, III, has held several positions in which he was charged with implementing the Clean Water Act (CWA) and its various programs. From 2001 to 2003, Mr. Mehan served as the Assistant Administrator for Water at the United States Environmental Protection Agency (EPA). Accordingly, Mr. Mehan has a keen interest in ensuring that the integrity of the statutory structure of the Clean Water Act is preserved. Most importantly here, because he was in charge of the office that developed the "fill" rule at issue in this case, Mr. Mehan is interested in seeing that the rule is properly understood and implemented.

STATEMENT

1. In 1982, the EPA promulgated new discharge standards for facilities engaged in mining

[1] In accordance with Supreme Court Rule 37.6, Amicus Curiae certify that no counsel for any party in this case authored this brief in whole or in part, and furthermore, that no person or entity, other than Amicus Curiae, has made a monetary contribution specifically for the preparation or submission of this brief.

and processing of metal ores. *See* Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. 54,598 (Dec. 3, 1982). Under those rules, the standard for all new mines that use a froth-flotation milling process to extract gold allows no discharge of process water into navigable waters, unless certain narrow exceptions apply. *See id.* 54,602-03 (explaining that certain discharges are allowed to specified limits where contaminants build up in recycled water and in excess rainwater and runoff). The EPA found that, by 1982, existing mills were achieving zero discharge "through total recycle and evaporation of process wastewater." *Id.* at 54,602. Because New Source Performance Standards (NSPS) "are based on the best available demonstrated technology" and "[n]ew plants have the opportunity to install the best and most efficient production processes and wastewater treatment technologies," *id.* at 54,600, the EPA concluded that it was appropriate to require new mills to meet a standard that was being met by a majority of existing mills, *id.* at 54,602. Moreover, the agency concluded, based on evidence that "[m]ills currently achieving zero discharge are located in areas ranging from flat to extremely steep and mountainous," "[z]ero discharge [was] demonstrated for a wide spectrum of topographical constraints." *Id.*

The zero-discharge standard adopted by the EPA in 1982 remains the standard today. *See* 40 C.F.R. § 440.104(b)(1) (2008). As a result, froth-flotation

mills built in the United States since January 17, 1983 (the effective date of the NSPS) that extract gold must use tailings ponds to dispose of process waste.

2. In 1989 – nearly seven years after the EPA promulgated the froth-flotation zero-discharge NSPS – Petitioner Coeur Alaska, Inc. proposed to extract gold from the Kensington Gold Mine in southeast Alaska using a froth-flotation process. *See* Kensington Venture Gold Mine Project, AK, Tongass National Forest-Chatham Area, Juneau Ranger District, 54 Fed. Reg. 43,189 (Oct. 23, 1989). Over the past 20 years, Coeur Alaska has proposed three different methods for disposing of its waste.

In 1990, Coeur Alaska proposed damming a nearby waterway, Sherman Creek, and discharging its process wastewater into the impounded waters. The EPA and the Army Corps of Engineers (Corps) never issued a permit for this proposed discharge. JA 288a-289a; 351a-352a.

In 1996, Coeur Alaska proposed to construct a "dry tailings facility," which would result in the tailings being dried and then contained in an impoundment. Both the Corps and the EPA issued permits to Coeur Alaska for this method of disposal. JA 289a; JA 352a.

In 2004, Coeur Alaska again changed its disposal plan. It proposed to release at least 210,000 gallons – and perhaps as much as 510,000 gallons – of process wastewater per day directly into nearby Lower Slate Lake, a 23-acre subalpine lake. JA 480a; Resps. Br. at

4 & n.2. In order to isolate the waste that would be placed in Lower Slate Lake from surrounding waters, Coeur Alaska would be required to build a 500-foot dam at the lake's outfall as well as a series of diversions, including a ditch through a wetland area and a pipeline to divert Slate Creek around the lake. JA 523a; JA 484a.

If the permits issued in this case are upheld, over the 10 to 15 year projected lifetime of the Kensington mine, millions of gallons of wastewater and approximately 4.5 million tons of solid waste will be dumped into the lake. JA 483a. It is estimated that the discharge will raise the bottom of the lake 50 feet, and will cause the surface area to increase from 23 acres to 62 acres. JA 482a-483a. The discharge will contain significant concentrations of several metals, including aluminum, copper, lead, and mercury; the pH of the effluent will be over 10, which is significantly higher than the current pH of the lake. JA 522a. There is no dispute that "all fish and most other aquatic life (such as macroinvertebrates, periphyton, and zooplankton) in Lower Slate Lake would be lost" during the years of mining operations. JA 197a. Although Coeur Alaska's closure plan includes restoring fish populations to Lower Slate Lake when it ceases mining operations, it is unclear what, if any, restoration will be possible. JA 254a; 202a; 522a.

3. In response to a question about Coeur Alaska's new disposal plan, on May 17, 2004, EPA Division Directors Diane Regas, James A. Hanlon, and Geoffrey H. Grubbs sent a memo to EPA Region

X's Director of the Office of Water, Randy Smith. JA 141a. They wrote that the discharge of the mine waste into Lower Slate Lake fell under section 404 of the Clean Water Act, which meant that the Corps would be responsible for issuing a permit for that discharge. JA 143a. Any other discharges to navigable waters, such as those from the impoundment of Lower Slate Lake, would require a permit from the EPA under section 402 of the Clean Water Act. JA 143a.

In December 2004, the U.S. Forest Service approved Coeur Alaska's revised plan of operations. JA 211a-212a. Consistent with the May 2004 memo's division of responsibility between the Corps and the EPA, in 2005, the EPA issued a permit for three proposed discharges of pollutants, none of which included the discharge of the process mining waste into the Lower Slate. JA 317a-331a. The Corps issued a permit for the discharge of the process wastewater into Lower Slate Lake. JA 266a-86a.

SUMMARY OF ARGUMENT

Section 301(a) of the CWA provides: "Except as in compliance with this section and sections [302, 306, 307, 318, 402, and 404] of this Act, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (2002); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992). This section does not require a single discharger to

comply simultaneously with sections 302, 306, 307, 318, 402, and 404. Instead, it requires compliance with all applicable sections of those listed.

The key issue in this case is which of the provisions Congress listed in section 301(a) apply to the proposed discharge into Lower Slate Lake. Some of the listed provisions (the balance of section 301 and sections 302, 306, 307, and 318[2]) impose *substantive* treatment obligations designed to fulfill the statutory goals and purposes, while the remaining two provisions (sections 402 and 404) are permitting devices designed to effectuate the substantive requirements of the statute.

The plain language and structure of the statute requires that the proposed discharge into Lower Slate Lake comply with the NSPS for gold mines using the froth-flotation process, promulgated in 1982 pursuant to section 306. Allowing the proposed discharges to evade mandatory pollution control requirements through the formalism of issuing a permit under section 404, rather than under section 402, ignores plain statutory text and the overall statutory scheme, eviscerates fundamental statutory goals, generates perverse incentives for dischargers, and creates unfair disparities among similar facilities.

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[2] Section 318 applies to aquaculture projects and is not relevant here. *See* 33 U.S.C. § 1328 (2002).

ARGUMENT

I. THE LANGUAGE, STRUCTURE, AND PURPOSES OF THE CLEAN WATER ACT REQUIRE THAT THE PROCESS WASTEWATER DISCHARGES FROM THE KENSINGTON MINE BE SUBJECT TO THE MANDATORY NEW SOURCE PERFORMANCE STANDARDS

A. Section 306 Imposes Mandatory Pollution Control Obligations

Section 301(a) prohibits "the discharge of *any* pollutant by *any* person" except as in compliance with the listed provisions. 33 U.S.C. § 1311(a) (emphasis added); *see Milwaukee v. Illinois* (*Milwaukee II*), 451 U.S. 304, 310-11 (1981). This conditioned discharge prohibition is the statutory vehicle through which Congress imposed specific treatment obligations, which are designed to become increasingly stringent and ultimately achieve the statutory goal of the complete elimination of discharges. *See E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 118-20 (1977).

Individual dischargers are not subject to all of the substantive control provisions listed in section 301(a) simultaneously because different controls apply to different facilities and in different circumstances. Thus, effluent limitations issued by the EPA pursuant to section 301(b) impose technology-based treatment obligations on *existing sources*, 33 U.S.C.

§ 1311(b),[3] while NSPS issued by the EPA under section 306 impose potentially stricter technology-based treatment obligations on *new sources*, *id.* § 1316.

Each treatment requirement, however, is mandatory with respect to sources to which it applies. Section 301(e) unambiguously provides: "Effluent limitations established pursuant to this section or [section 302] *shall be applied* to *all point sources* of discharge of pollutants in accordance with the provisions of this chapter." *Id.* § 1311(e) (emphasis added). Similarly, section 306 requires: "After the effective date of standards of performance promulgated under this section, it shall be unlawful for *any owner or operator of any new source* to operate such source in violation of any standard of performance applicable to such source." *Id.* § 1316(e) (emphasis added).[4]

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[3] Congress mandated limits based on the "best practicable control technology currently available" (BPT) by 1977, 33 U.S.C. § 1311(b)(1)(A), and stricter limitations based on the "best available technology economically achievable" (BAT) thereafter, *id.* § 1311(b)(2)(A). Intermediary treatment requirements apply to conventional pollutants, based on the "best conventional pollutant control technology." *Id.* § 1311(b)(2)(E).

[4] Likewise, Section 307 requires EPA to adopt mandatory limitations for sources of toxic pollutants: "After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for *any owner or operator of any source* to operate any source in violation of any such effluent standard or prohibition or pretreatment standard." *Id.* § 1317(d) (emphasis added).

Once the proper category is determined for a given source,[5] the mandatory obligation of either section 301(e) or section 306(e) applies. *See Am. Iron and Steel Inst. v. EPA*, 568 F.2d 284, 307-08 (3d Cir. 1977) (invalidating regulation exempting facilities once the EPA promulgated uniform limitations, and holding that limitations apply to *all sources* within the class).

The EPA promulgated NSPS for froth-flotation process gold mines in 1982 and that standard remains in effect. *See* 40 C.F.R. § 440.104(b)(1) (2008). There is no dispute that the Kensington Mine qualifies as a new source and will employ the froth-flotation milling process to extract gold. Under the plain language of section 306(e), it is unlawful for Petitioners to operate in violation of those standards, and it was unlawful for the Corps to issue a permit allowing them to do so.

B. Section 402 Effectuates the Mandatory Applicable Treatment Standards

Sections 402 and 404 are procedural mechanisms designed to implement the substantive requirements of the Act. Congress enacted section 402

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[5] A "new source" is "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section." 33 U.S.C. § 1316(a)(2).

to implement, *inter alia*, effluent limitations and NSPS adopted by the EPA. 33 U.S.C. § 1342(a) (2002). This section serves as the principal mechanism for permitting discharges under the Clean Water Act. *See Am. Iron and Steel Inst. v. EPA*, 115 F.3d 979, 990 (D.C. Cir. 1997) ("The centerpiece of the CWA is the NPDES permitting program [of section 402].").

Section 404, on the other hand, applies to a much more limited category of discharges, and is not the mechanism Congress adopted to effectuate effluent treatment standards. *See* 33 U.S.C. § 1344(a) (2002). Congress' principal focus in section 404 was on the ability of the Corps of Engineers to dredge waterways to maintain and improve navigability for commerce, and to permit disposal of the resulting dredged spoils at specified sites. *See Minnesota by Spannaus v. Hoffman*, 543 F.2d 1198, 1203-06 (8th Cir. 1976). As such, section 404 created a separate permitting mechanism for discharges of dredged and fill material, whereas section 402 authorized the EPA and the states to regulate other pollutants. *Id.* at 1208 ("Unlike all other pollutants, dredged spoil is not regulated under the NPDES.").

Petitioners make a "category mistake" in arguing that the agencies must choose between compliance with the applicable NSPS under section 306 and the permitting requirements in section 404. Petr. Coeur Alaska Br. at 22-32; Petr. Alaska Br. at 34-35. The first step under the Act is to identify the substantive treatment requirements that apply to a particular

discharger. Here, section 306(e) plainly mandates that the NSPS for froth-flotation gold mines applies to the proposed Kensington Gold Mine. Next, the agencies must apply the permitting mechanism that properly implements the applicable substantive requirements. Only section 402 does so.[6] The correct statutory construction is one that fully effectuates the law's interlocking provisions. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004) ("[The Court] must, if possible, construe a statute to give every word some operative effect.").

1. Section 402 is the Proper Permitting Mechanism for Coeur Alaska's Proposed Discharge

This Court has explained the carefully-designed relationship between the substantive pollution controls in sections 301, 306, and 307 and the permit mechanism in section 402:

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[6] Petitioners argue that their discharges meet the regulatory definition of "fill," and therefore may be permitted under section 404. Assuming they are correct, the discharges would meet *both* the definition of "fill" for purposes of section 404, and the definition of "pollutant" for purposes of section 402. Then Petitioners argue further that section 404 does not by its own terms mandate compliance with section 306, as section 402 does. That difference, however, only confirms that section 402 is the proper permitting provision for this source. As discussed, *infra*, however, the regulatory definition of "fill" cannot and does not cover this discharge.

> [T]he Amendments establish the National Pollutant Discharge Elimination System (NPDES) as a means of achieving and enforcing the effluent limitations. Under NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. An NPDES permit serves to transform generally applicable effluent limitations and other standards . . . into the obligations . . . of the individual discharger. . . .

EPA v. California ex rel. State Water Res. Control Bd., 426 U.S. 200, 204-05 (1976), *superseded by statute on other grounds*, 33 U.S.C. § 1323(a) (2002) (citations omitted); *see also Milwaukee II*, 451 U.S. at 311 (explaining that once the EPA promulgates effluent limitations by regulation, those limitations are incorporated as permit conditions under section 402). In *Milwaukee II*, this Court noted that a section 402 permit "directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *Id.* at 318. The permits "incorporate, *as required by the Act*, the specific effluent limitations established by EPA regulations. . . ." *Id.* at 319-20 (emphasis added) (citations omitted); *see also Arkansas v. Oklahoma*, 503 U.S. at 101-02 (stating that section 301(a) prohibits discharges absent an NPDES permit, and the NPDES permit is the primary means of enforcing effluent limitations); *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 71 (1980) (interpreting section 402 to require that all dischargers must obtain NPDES permits, which translate

generally applicable effluent limitations into individual obligations of dischargers).

The Courts of Appeals have also explained the relationship between the permit mechanism in section 402 and treatment requirements established by EPA regulations:

> [T]he permit-issuing system established by section 402 of the Act, 33 U.S.C. § 1342, provides a procedure whereby the general effluent limitations for each class of point sources are transformed by EPA, or some EPA-approved state agency, into an authorization for a specific plant or mill to discharge effluents up to specified limits.

Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1020 (D.C. Cir. 1978); *see Rybachek v. EPA*, 904 F.2d 1276, 1283 (9th Cir. 1990) ("Through the Clean Water Act, Congress has directed EPA to incorporate into the permits increasingly stringent technology-based effluent limitations."); *U.S. Steel Corp. v. Train,* 556 F.2d 822, 830 (7th Cir. 1977), *abandoned on other grounds by City of West Chicago, Ill. v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644 (7th Cir. 1983) (explaining role of NPDES permit to translate generally applicable limitations into obligations of individual dischargers); *Am. Paper Inst. v. Train*, 543 F.2d 328, 334 (D.C. Cir. 1976) ("Primary enforcement of these standards is to be accomplished under Section 402 of the Act. 33 U.S.C. § 1342. This section establishes a permit system as the basic mechanism for enforcing the effluent limitations established under Section 301.").

No opinion except for the District Court decision below mentions the possibility of using section 404 as the permitting mechanism for point sources for which the EPA has adopted effluent limitations or NSPS, and for good reason. Section 402(a) authorizes the EPA to issue NPDES permits "upon condition that such discharge will meet either (A) all applicable requirements under sections [301, 302, 306, 307, and 403] . . . or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this [Act]." 33 U.S.C. § 1342(a) (2002). State NPDES permits must ensure compliance with the same controls. *Id.* § 1342(b)(1). Moreover, the "permit shield" provision in section 402(k) decrees that "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance with" the same list of statutory provisions under which the EPA establishes NSPS and other pollutant control obligations. *Id.* § 1342(k).

2. Section 404 Cannot Be Used to Exempt This Facility from Mandatory NSPS

Section 404 applies on its face to a much narrower category of pollutant discharges that are *not* subject to NSPS or other technology-based controls. The presumption that the EPA implements the major pollution control provisions of the statute is underscored in section 101(d) of the Act, which provides: "Except as otherwise *expressly provided* . . . the

Administrator of the Environmental Protection Agency . . . shall administer this [Act]." 33 U.S.C. § 1251(d) (emphasis added). Thus, this Court should be wary of allowing the Secretary of the Army to exempt dischargers from pollution controls promulgated by the Administrator absent an *express provision* to that effect in section 404 or elsewhere in the Act.

Section 404 authorizes the Secretary to issue permits only for a specific subcategory of pollutants, "dredged or fill material," and only to "specified disposal sites." 33 U.S.C. § 1344(a). Although section 404 permits are subject to regulatory guidelines adopted by the EPA, those rules are based on receiving water impacts and other factors rather than uniform, technology-based treatment requirements. *See id.* §§ 1344(b), 1343(c). Section 404 contains no reference whatsoever to effluent limitations or NSPS adopted by the EPA for industrial discharges under section 301 or section 306, and thus is not designed to implement those controls.[7]

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[7] Petitioners argue that section 404 includes references to section 307, but *not* to section 301 or section 306. Petr. Coeur Alaska Br. at 27 n.4; *see* Petr. Alaska Br. at 29 n.6 Congress, however, added references to section 307 to clarify that certain exemptions to section 404 would not apply to any "discharges of dredged or fill material containing toxic pollutants regulated under section 307." H.R. Rep. No. 95-830, at 105 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4480. Likewise, Petitioners assert that the omission in section 404(p) of any reference to section 306 authorized the Corps, by negative

(Continued on following page)

Likewise, the "permit shield" in section 404(p), analogous to the NPDES permit shield in section 402(k), provides that compliance with a section 404 permit "shall be deemed compliance . . . with sections [301, 307, and 403]," but not with the section 306 NSPS to which Petitioners' proposed discharges are subject. *Compare* 33 U.S.C. § 1342(k) *with id.* § 1344(p). The straightforward interpretation of the reference to section 301 is that compliance with section 404 exempts a discharger from the presumptive ban imposed by section 301(a), in parallel with the concomitant reference in section 301(a) to section 404. It is entirely illogical to assume that Congress intended section 404 to implement effluent limitations for existing sources pursuant to section 301(b), but not NSPS for the same categories of industries pursuant to section 306.

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inference, to issue a permit that exempts that discharger from treatment requirements that section 306(e) plainly imposes on "any owner or operator" of a new source. 33 U.S.C. § 1316(e). There is no rational explanation why a discharger permitted under section 402 is subject to the statute's mandatory NSPS while a discharger permitted under section 404 is not.

3. The EPA and Corps' Definition of Fill Cannot and Should Not Be Read As Displacing the Clear Statutory Commands of the Clean Water Act

Petitioners claim that Coeur Alaska's proposed discharge falls within the EPA and Corps' 2002 revised definition of "fill," found in 33 C.F.R. § 323.2(e)(1)(ii) (2008) and 40 C.F.R. § 232.2 (2008), because it will raise the elevation of Lower Slate Lake by 50 feet and is "mining-related slurry." *See* Coeur Alaska Br. at 17. As such, they assert the discharge must be permitted under section 404, not section 402. The fill definition, however, cannot undermine the statutory commands of the Clean Water Act and should not be read to do so.

"[N]o deference is due to agency interpretations at odds with the plain language of the statute itself." *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989), *superseded by statute on other grounds*, Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990); *see* 5 U.S.C. § 706(2)(A), (C) (allowing courts to set aside agency action that are "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations"). Where, as here, the plain language of a statute provides a clear answer, "that is the end of the matter." *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984). The statute, not the agency's interpretation, governs. *White v. United States*, 543 F.3d 1330, 1338 (Fed. Cir. 2008) ("The

agency's interpretation must be rejected . . . because the interpretation it advocates would result in a regulation that conflicts with the clear language of the statute. . . . Since the agency interpretation of its regulation would change precisely what Congress has already decided, it must be rejected.").

The agencies' unprecedented interpretation and application of the fill regulation to Coeur Alaska's mining operations in this case contravenes the plain language of the statute. As such, it does not warrant deference of any kind and should be disregarded.

Moreover, when the definition of fill was revised in 2002 – which Mr. Mehan oversaw in his role as the EPA's Assistant Administrator for Water – the agencies never contemplated or intended the unlawful result reached by the agencies here. Because the EPA and the Corps failed to consider the context in which the revision arose, and the purposes for which it was promulgated, they misapplied the fill definition in this case.

Before 2002, the Corps and the EPA defined fill differently. The Corps defined fill as

> any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act.

33 C.F.R. § 323.2(e) (2000). The EPA, on the other hand, defined fill as "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose." 40 C.F.R. § 232.2 (2000).

According to the agencies, these inconsistent definitions – one emphased purpose; the other did not – "resulted in inconsistencies which impede the fair and effective implementation of the CWA in a number of ways." Proposed Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge Fill Material," 65 Fed. Reg. 21,292, 21,294 (Apr. 20, 2000); *see also Clean Water Act Definition of Fill Hearing Before Subcomm. on Clean Air, Wetlands, and Climate Change of the S. Comm. on Environment and Public Works*, 107th Cong. (Testimony of Benjamin H. Grumbles, Deputy Assistant Administrator, Office of Water, United States Environmental Protection Agency and George S. Dunlop, Deputy Assistant Secretary of the Army (Policy and Legislation)) (June 6, 2002), *available at* http://epw.senate.gov/107th/Grumbles_060602.htm [hereinafter, *Deputies' Senate Testimony*].

In particular, the agencies pointed to the Ninth Circuit's decision in *Resource Investments Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998), which involved the proposed construction of a solid waste landfill on wetlands that qualified as waters of the United States. The Corps had denied the application for a permit because the applicant "had failed to demonstrate the unavailability of

practicable alternatives for waste disposal that were less environmentally damaging . . . and that the proposed landfill was not in the public interest because it would cause significant degradation of wetlands and posed an unacceptable risk of groundwater contamination." *Id.* at 1165.

When the denial was challenged, the question was whether a 404 permit was required and, if so, whether the denial was proper; no one argued that a 402 permit should be required. The Ninth Circuit concluded that a section 404 permit was *not* required, relying on the Corps definition of fill:

> [T]he layers of gravel and low-permeability soil, as well as the synthetic liner that would underlie the solid waste in [the] proposed landfill, do not constitute fill material because their primary purpose is not to replace an aquatic area with dry land or to change the bottom elevation of a waterbody, *see* 33 C.F.R. § 323.2(e), but rather to serve as a leak detection and collection system.

Id. at 1168.

The agencies therefore proposed in 2000 to revise the definition of fill to address the error of *Resource Investments Inc.* and other cases that excluded certain activities from regulation under section 404. *See* 65 Fed. Reg. at 21,294-95. As Deputies from both the Corps and the EPA explained to the Senate Subcommittee on Clean Air, Wetlands, and Climate Change,

this change was essential to avoid results that would undermine the statute:

> [I]f this approach to interpreting the Corps' "primary purpose test" were to be taken to its extreme conclusion, the unreasonable end result could be that almost any traditional fill material proposed to be placed in waters of the U.S. does not need a Section 404 permit. Such an interpretation would be clearly contrary to the intent of Congress expressed in the plain words of CWA Sections 404 and 301, which require that any "fill material" to be placed in any water of the U.S. must be legally authorized by a permit under CWA Section 404.

Deputies' Senate Testimony.

The agencies also noted that the EPA's then-current definition of fill might create confusion between section 402 and section 404:

> [W]e believe that this definition needs clarification, because, read literally, it could subject to regulation under CWA section 404 certain pollutants that have been, are being, and should be regulated by the technology and water quality based standards used in the section 402 program. For example, industrial waste or sewage may contain suspended solids which ultimately will settle to the bottom following discharge. Although this would not replace waters with dry land, this could have effects on the water body's bottom elevation. *Where such pollutants are*

> *covered by proposed or final effluent limitations guidelines and standards under section 301, 304, or 306 of the CWA or the discharge is covered by a NPDES permit issued under section 402 of the CWA, the proposed rule would exclude the discharge from the definition of fill.*

65 Fed. Reg. at 21,295 (emphasis added). The proposed rule therefore included the following caveat:

> The term fill material does not include discharges covered by proposed or final effluent limitations guidelines and standards under sections 301, 304 or section 306 of the Clean Water Act (see generally, 40 CFR part 401), or discharges covered by an NPDES permit issued under section 402 of the Clean Water Act.

Id. at 21,299.

In the final rule, the agencies deleted this language due to "confusion associated with the proposed provision," largely over whether it referred to effluent standards currently in effect or to ones that would be promulgated in the future. Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,135 (May 9, 2002). The agencies explained, however, that the deletion had no substantive effect:

> [A]lthough we have removed the language in question from the rule itself, we emphasize that today's rule generally is intended to maintain our existing approach to regulating

> pollutants under either section 402 or 404 of the CWA. Effluent limitation guidelines and new source performance standards ("effluent guidelines") promulgated under section 304 and 306 of the CWA establish limitations and standards for specified wastestreams from industrial categories, and those limitations and standards are incorporated into permits issued under section 402 of the Act. . . . Recognizing that some discharges (such as suspended or settleable solids) can have the associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants, we do not consider such pollutants to be "fill material," and nothing in today's rule changes that view. *Nor does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402 of the CWA.*

Id. at 31,135 (emphasis added).

The Deputies later reiterated that uncertainty expressed over the proposed provision led to its removal but that the agencies did not intend to change the allocation of permitting under sections 402 and 404:

> [W]hile the language in question does not appear in the final rule itself, the preamble does emphasize that the effects-based definition is consistent with EPA's long-standing approach to defining fill material, and generally is intended to maintain our existing

> approach to regulating pollutants under either Section 402 or 404 of the CWA. In particular, as noted in the preamble, the final rule does not change any determination EPA has made regarding discharges that are subject to effluent limitation guidelines and standards, which will continue to be regulated under Section 402 of the CWA.

Deputies' Senate Testimony; see also Qs and As on the "Fill" Rule at 2, http://www.usace.army.mil/cw/cecwo/reg/fillqas.pdf.

Accordingly, Petitioners' attempt to exploit this deletion must fail because it disregards the repeated statements of the agencies that the deletion was not intended to change the regulatory approach under sections 402 and 404.

Petitioners also emphasize that the agencies changed the definition of "fill" to include "placement of overburden, slurry, or tailings or similar mining-related materials," 67 Fed. Reg. at 31,135, which, they assert, is what will be discharged by the proposed mine. They again fail to place this change in context and thus misunderstand its applicability.

In the original notice in 2000, the agencies cited *Bragg v. Robertson*, 72 F. Supp. 2d 642 (S.D.W. Va. 1999), as a case that misunderstood the fill rule. The court in that case questioned the parties' agreement that the placement of coal mining overburden into waters of the United States must be permitted under section 404. Pointing to the primary purpose language

of the Corps' regulation, it suggested that the Corps lacked regulatory authority over the proposed discharge because the "primary purpose [was] waste disposal." *Id.* at 658.

The 2000 notice sought to clarify the issue presented in *Bragg*:

> With regard to proposed discharges of coal mining overburden, we believe that the placement of such material into waters of the U.S. has the effect of fill and therefore, should be regulated under CWA section 404. . . . In Appalachia in particular, such discharges typically result in the placement of rock and other material in the heads of valleys, with a sedimentation pond located downstream of this "valley fill." This has required authorization under CWA section 404 for the discharges of fill material into waters of the U.S., including the overburden and coal refuse, as well as the berms, or dams, associated with the sedimentation ponds. The effect of these discharges is to replace portions of a water body with dry land. Therefore, today's proposal makes clear that such material is to be regulated under CWA section 404.

65 Fed. Reg. at 21,295. The agencies emphasized, however, that this change was a narrow clarification and it was not intended to alter what was to be permitted under section 402: "[T]oday's proposal recognizes that discharges from coal mining activities that are covered by a proposed or final EPA effluent

guideline (*See, e.g.*, 40 CFR part 434) are not fill material and would remain subject to regulation under CWA section 402." *Id.* at 21,296.

When the agencies broadened the fill language in the final rule to include more than just "coal mining overburden," they did so because "[t]he general intent of this rule is to cover materials that have the effect of fill, not simply to focus on any one industrial activity." 67 Fed. Reg. at 31,135. In other words, the agencies revised the definition to include wastes from all mining operations, not just coal mining operations, when those wastes have the same effect as coal mining overburden in valley fills. Nothing in this change altered the basic requirement that mining activities covered by an effluent guideline required a permit under section 402.

Indeed, consistent with this longstanding division of work under the Clean Water Act, in *Kentuckians for the Commonwealth, Inc. v. Rivenburgh,* the Fourth Circuit upheld the Corps' determination that section 404 permits, not 402 permits, are required for valley fills in connection with mountaintop coal mining. 317 F.3d 425 (4th Cir. 2003). Notably, the pollutants in question were *not* subject to effluent limitations or NSPS promulgated by the EPA under sections 301, 306, or 307. *See id.* at 445. In fact, the Court pointed out that "Section 402 confers on the EPA responsibility to regulate the discharge of pollutants into waters under mechanisms to administer effluent limitations," *id.* at 448, and specifically upheld the determination that the valley fill activity

was to be regulated under section 404 because the Corps was not attempting to issue a permit for an "effluent that could be regulated by ongoing effluent limitations as described in § 402," *id.*

Like valley fills, the division of permitting responsibility with respect to gold mining using froth-flotation extraction has been clear for many years. In 1994, the EPA issued a guidance document on gold mining that explained:

> The national technology-based effluent guideline limitations have been established for discharges from most active gold mines under the Ore Mining and Dressing Point-Source. These regulations address point source discharges from all types of gold extraction techniques, including open-pit, underground, froth-flotation, heap, *in situ*, and tank cyanide leaching.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, TECHNICAL RESOURCE DOCUMENT EXTRACTION AND BENEFICIATION OF ORES AND MINERALS: GOLD, Vol. 2 1-59 (Aug. 1994) (citation omitted), *available at* http://www.epa.gov/osw/nonhaz/industrial/special/mining/techdocs/gold/goldch1.pdf. It further explained that gold mines with discharges into navigable waters must be permitted under section 402, which in turn must comply with these standards. *See id.* at 1-59 to1-61.

The 2002 definition of fill, issued when Mr. Mehan oversaw the EPA's CWA programs, was never intended to and, as a matter of law, cannot upset the

requirements of the Clean Water Act. Because Coeur Alaska's proposed discharge is subject to the NSPS found in 40 C.F.R. § 440.104(b)(1), it must be permitted under section 402.

C. Petitioners' Statutory Claims Misunderstand the Relationship Between Sections 402 and 404

Petitioner Coeur Alaska argues that section 404 applies to its proposed discharges into Lower Slate Lake because they claim that section is a more specific provision that overrides the general requirement of section 402. Petr. Coeur Alaska at 27-29. This misunderstands the Clean Water Act on multiple fronts.

First, it is not clear that section 404 is the "more specific" of these two provisions. It is true that "fill" material is one of many pollutants subject to the discharge ban in section 301(a), and in that sense section 404 applies to a narrower scope of pollutants than does section 402. Section 402 permits, however, implement the more specific treatment obligations promulgated by the EPA pursuant to sections 301(b), 306 and 307. As a result, they effectuate far more specific control obligations than the generalized rules for selecting disposal sites under section 404(b).

Second, Congress adopted section 404 as a very limited exception to the broader permitting authority of section 402. Section 404 was never intended to supplant section 402 as the predominant means of

implementing categorical industrial effluent limitations.

Third, it is inappropriate to apply the canon of statutory construction that specific provisions govern general ones where doing so fails to give effect to key operative statutory provisions, and to the statute as a whole. In *Industrial Union Dept., AFL-CIO v. American Petroleum Institute,* this Court rejected an argument that the more specific provision regarding toxic materials in section 6(b)(5) of the Occupational Safety and Health Act of 1970 overrides the more general definition of occupational safety and health standard in section 3(8) of that statute, and construed the statute in a way that gave effect to both provisions. 448 U.S. 607, 639-40 (1980). Here, section 306(e) of the CWA can be given its full intended effect only if the Kensington Mine is required to get a permit under section 402 rather than 404.

Finally, allowing this result will provide extremely perverse incentives for dischargers, or at least, would reward those dischargers within an industrial category who have the highest volume and highest impact discharges. Under the decision at issue here, discharges with enough mass of suspended solids to significantly change the bottom contour of a water body can receive a section 404 permit to discharge those wastes with no treatment whatsoever. In contrast, a discharger of the same industrial wastes, within the same industrial category defined by the EPA, but whose wastes are lower in volume or lower in concentrations of suspended

solids, receive a section 402 permit and are subject to a strict zero discharge requirement. In other words, discharges that create the most environmental harm receive the least stringent controls. Congress cannot possibly have intended such a bizarre result.

II. DISCHARGE REQUIREMENTS ESTABLISHED BY REGULATION CANNOT BE MODIFIED IN PERMITS

A. This Court Rejected a Similar, But Less Extreme, Argument in *E. I. du Pont de Nemours & Co. v. Train*

Petitioners seek to re-litigate a contention that their counterparts lost over three decades ago in *E. I. du Pont de Nemours & Co. v. Train*, although in a different procedural context. In *du Pont*, chemical manufacturers argued that regulations adopted by the EPA under sections 301, 304 and 306 merely constituted "guidelines" for permit writers, and that enforceable effluent limitations could only be established through section 402 permits. *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 124 (1977). This Court ruled unanimously that Congress directed the EPA to adopt uniform effluent limitations and NSPS in regulations that apply to all sources within a defined category, unless subject to an applicable statutory or regulatory variance. *Id.* at 126-39.

If the Court were to allow the Corps to exempt individual dischargers from mandatory NSPS through the shell game of a section 404 permit rather

than a section 402 permit, that decision would overrule *du Pont*, at least with respect to new sources whose discharges might qualify as "fill material." In fact, because Petitioners' argument here is more extreme than that rejected by this Court in *du Pont*, it should be rejected *a fortiori*.

First, the section 404 permit issued by the Secretary contains *no treatment requirements whatsoever*. JA 360a-361a (tailings will be deposited in Lower Slate Lake with no prior treatment). In *du Pont*, the petitioners implicitly conceded that dischargers of industrial wastes are subject to effluent limitations of *some kind*. *See* 430 U.S. at 130-133. They argued, however, that those requirements could be tailored to individual sources through NPDES permits. *Id.* This Court rejected that claim, because Congress mandated uniformity in technology-based controls and because Congress and the EPA adopted narrowly-tailored variance provisions by statute and regulation as the exclusive relief valve from that uniformity. *Id.* at 129-32; *see also Am. Iron and Steel Inst. v. EPA*, 568 F.2d 284, 307-08 (3d Cir. 1977) (rejecting EPA effort to exempt individual sources by regulation, rather than through approved statutory variance provisions). It is difficult to explain why Congress would allow the Secretary to exempt industrial waste dischargers through section 404 when Congress – and this Court – rejected narrower relief through the carefully-constructed system of regulations, variances, and permits established in sections 301, 306, and 402. Moreover, under section 101(d), such a

result requires express language not present in section 404.

Second, petitioners in *du Pont* sought relief only from the effluent limitations applicable to existing sources. Petitioners here seek an exemption from the stricter NSPS, despite Congress' clear understanding that new sources can design and implement pollution controls free from the constraints of existing infrastructure that may impede similar controls at existing sources. *Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177, 263 (5th Cir. 1989), *clarified on reh'g*, 885 F.2d 253 (1989). Again, it is difficult to believe that Congress intended a more radical exemption from NSPS through a section 404 permit than it – and this Court – allowed for existing sources through a section 402 permit.

Third, Petitioner Coeur Alaska relies on the "permit shield" provision in section 404, just as the petitioners in *du Pont* relied on the analogous provision in section 402(k). *See* Petr. Coeur Alaska Br. at 28-29. In *du Pont*, however, this Court dismissed that argument in a footnote:

> Petitioners attach some significance to the fact that compliance with a § 402 permit is "deemed compliance . . . with sectio[n] . . . 306. . . ." § 402(k). This provision plainly cannot allow deviations from § 306 standards in issuing the permit. For, after standards of performance are promulgated, the permit can only be issued "upon condition that such discharge will meet . . . all applicable

> requirements under sectio[n] ... 306. . . ." § 402(a)(1); and one of the requirements of § 306 is that no new source may operate in violation of any standard of performance. § 306(e). The purpose of § 402(k) seems to be to insulate various permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question of whether their permits are sufficiently strict. In short, § 402(k) serves the purpose of giving permits finality.

430 U.S. at 138 n.28. Once more, it is difficult to see how the shield provision of section 404, which does not even purport to address compliance with section 306, might exempt a discharger from the mandatory NSPS standards when this Court declined to give such effect to section 402(k).

B. Allowing the Secretary to Confer Unbridled Exemptions Through Section 404 Would Render Congress' Carefully-Defined Statutory Variances Superfluous

Congress adopted specific, narrowly-prescribed variances from the categorical technology-based treatment standards promulgated by the EPA. Notably, *none of those variances apply to new sources.* Where Congress includes precise exceptions that apply under only constrained circumstances, courts should not create – or allow agencies to create – a much broader exception by implication. *See United*

States v. Johnson, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.").

In section 301(c), Congress allowed the Administrator to modify BAT limitations for individual sources, but only "upon a showing . . . that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." 33 U.S.C. § 1311(c). In holding that the EPA properly declined to provide a similar variance from BPT effluent limitations, this Court explained that the narrowly limited purpose of section 301(c) was to provide relief from the stricter second round BAT limits where a discharger met at least the first round of BPT limits, and where the variance requires "the same sort of . . . commitment as the general BAT standard creates for the class." *Nat'l Crushed Stone Ass'n*, 449 U.S. at 73-74. Even where this variance applies, it requires the best available technology within the economic capability of that source, and "reasonable further progress" toward the statutory goal of eliminating discharges. *Id.* As explained by the D.C. Circuit:

> Although this formulation ensures a meaningful variance, it should be noted that it is not a license for avoidance of the Act's strict

> pollution control requirements. It simply allows individual operators to argue, that, given the overall impact of an effluent limitation on their operations, they are faced with *stricter* requirements than the Act authorizes EPA to place on the industry as a whole.

Weyerhaeuser Co., 590 F.2d at 1035 (emphasis in original); *see also Am. Frozen Food Inst. v. Train*, 539 F.2d 107, 120 (D.C. Cir. 1976).

By contrast, Petitioners suggest that Congress created – by sheer negative implication – a much broader exemption from the stricter NSPS, without any showing that the discharger cannot afford to implement the standards or is unfairly burdened when compared to others in its category. This is so, claim Petitioners, even though Congress did not include a variance for new sources in section 306. As noted in *du Pont*: "In striking contrast to § 301(c), there is no statutory provision for variances, and a variance provision would be inappropriate in a standard that was intended to insure national uniformity and 'maximum feasible control of new sources.' S. Rep. No. 92-414, p.58 (1971), Leg. Hist. 1476." 430 U.S. at 138.

Similarly, Congress enacted a limited variance from the pollution control requirements imposed on existing dischargers of nonconventional pollutants, but only when dischargers adopt treatment at least sufficient to meet BPT requirements and applicable water quality-based effluent limitations. 33 U.S.C.

§ 1311(g). Again, this variance is not available to new sources. *See Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 192-93 (2d Cir. 2004). Yet Petitioners seek a far broader exemption without any of the constraints in section 301(g).

Finally, in *du Pont* this Court approved presumptively uniform national effluent guidelines in part because the EPA adopted, by regulation, "fundamentally different factors" (FDF) variances whereby individual sources could demonstrate that their pollution control capabilities were limited by differences directly relevant to the EPA's rationale for issuing the national limitations. In 1985, this Court upheld the EPA's use of FDF variances for discharges of toxic pollutants from existing sources, while noting that those variances were not available for new sources. *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 122 n.8 (1985). Congress codified the EPA's FDF variances, but only for limited circumstances. *See* 33 U.S.C. § 1311(n) (2002).

The fact that Congress adopted narrowly-constrained variances for existing sources, and that it expressly foreclosed each of those variances for new sources, shows that it could not possibly have intended dischargers to obtain broader, wholesale exemptions from NSPS simply by obtaining a permit under section 404 rather than section 402.

III. EXEMPTING THE PROPOSED DISCHARGES FROM NSPS VIOLATES FUNDAMENTAL STATUTORY GOALS

A. Allowing This Discharger to Evade the NSPS Would Contravene the Zero Discharge Goal

As a principal means of attaining the statutory objective, Congress directed the EPA to adopt increasingly stringent technology-based limits on point sources, and articulated a "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1).

Congress backed up this statutory goal with precise directions that the EPA, through its effluent limitations and NSPS, prohibit discharges of pollutants wherever possible. For the NSPS applicable here, Congress mandated "application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting *no discharge of pollutants*." *Id.* § 1316(a)(1) (emphasis added).

Here, the EPA promulgated zero discharge limitations for new gold mines using a froth-floatation process, finding that it was technologically and economically feasible to dispose of wastes from this process in upland areas. Congress mandated that such prohibitions be imposed on all facilities within the category, and the statute contains "no provision for exceptions from the standards for individual

plants; on the contrary, [it] makes it unlawful to operate a new source in violation of the applicable standard of performance after the effective date." *du Pont*, 430 U.S. at 121; *see also Chem. Mfrs. Ass'n*, 470 U.S. at 122 n.8 (noting that fundamentally different factors variances are not available for new sources). Accordingly, there is no justification for allowing Coeur Alaska to evade the NSPS requirements.

B. The Exemption Granted Here Defeats the Uniformity Mandated by Congress, and Unfairly Favors Some Sources Over Others

To ensure that similarly-situated dischargers are treated fairly, and to prevent states from competing for jobs at the expense of national pollution reduction goals, Congress directed that effluent limitations and NSPS be uniform within industry categories, subject to the limited variance provisions discussed above. *See du Pont*, 430 U.S. at 121, 126-30; *Chem. Mfrs. Ass'n*, 470 U.S. at 119.

This Court has repeatedly highlighted Congress' requirement that treatment standards within industry categories be implemented as uniformly as possible. *See du Pont*, 430 U.S. at 129-30 (discussing existing sources and quoting extensively from explanations by Senator Muskie, principal Senate author and sponsor of the 1972 amendments), 138 (new sources); *Nat'l Crushed Stone Ass'n*, 449 U.S. at 77-78 (discussing uniform BPT limitations); *Chem. Mfrs.*

Ass'n, 470 U.S. at 119, 130 (requirement for EPA to establish "uniform discharge limitations for . . . classes and categories" of dischargers; and noting that "Congress did intend uniformity among sources in the same category, demanding that 'similar point sources with similar characteristics . . . meet similar effluent limitations.'"). The D.C. Circuit explained the reasons for this policy in *Weyerhaeuser Co. v. Costle*: "Congress considered uniformity vital to free the states from the temptation of relaxing local limitations in order to woo or keep industrial facilities. In addition, national uniformity made pollution clean-up possible without engaging in the divisive task of favoring some regions of the country over others." 590 F.2d at 1042.

Allowing treatment obligations to vary according to the permitting provision used would flout this statutory goal of uniformity in application of the Act's technology-based treatment requirements. There is no evidence in the text of section 404 that Congress intended that provision to be used in a way that is so manifestly contrary to the goal of uniform treatment obligations established in the rest of the statute.

C. Allowing Untreated Discharges to Destroy a Pristine Lake Makes a Mockery of the Statutory Objective to Restore and Maintain the Integrity of the Nation's Waters

The fundamental objective of the CWA is to "restore and maintain the chemical, physical, and

biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). *See, e.g., PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994); *Arkansas v. Oklahoma*, 503 U.S. at 101, 105-06; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985). According to the 1972 Senate Report:

> Maintenance of such integrity requires that any changes in the environment resulting in a physical, chemical or biological change in a pristine water body be of a temporary nature, such that by natural processes, within a few hours, days or weeks, the aquatic ecosystem will return to a state functionally identical to the original.

S. Rep. No. 92-414, at 76 (1972) (Conf. Rep.), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742; *see also* H.R. Rep. No. 92-911, at 76-77 (1972) (Conf. Rep.).

Here, the proposed discharges would kill every fish in a pristine Alaskan Lake, and eliminate the natural processes and functions of an ecosystem for over a decade. It is difficult to fathom a result so diametrically opposed to the fundamental objective of the CWA. Respondents assert that they would restore the lake and restock fish in some ten to fifteen years, after mining operations cease. Even assuming that such restoration is possible, the restoration proposed here is inconsistent with Congressional intent that any environmental changes from discharges should be restored through natural processes, not dubious artificial restoration, and that natural processes

should be restored within "a few hours, days, or weeks," not decades.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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